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United States Circuit Court of Appeals

Ninth Circuit

Appeal from

United States Court for China

WALTER CHALAIRE,

Appellant

v

No. 7753

CORNELL S. FRANKLIN,

Appellee

BRIEF FOR APPELLEE

Herewith, and following under same cover is Reprint of Motion to Affirm Judgment which was filed December 14, 1935, and has Points and Authorities also reprinted

Attorneys for Appellee: Frank E. Hinckley and W. H. Lawrence, both of San Francisco, California
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Order of Subjects

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Cases and Other Authorities

In the Memorandum by Counsel, Shanghai, China

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BRIEF FOR APPELLEE

Assuming, and not conceding, appellant has presented a case reviewable on appeal, this brief for appellee respectfully maintains:

Point One: The Congress has provided limitation of actions on written contract in the United States Court for China in terms of similar provision for the District of Columbia.

Point Two: In addition to good defense on limitation of actions the answer well pleaded other good defenses, to wit: lawful termination of agreement incomplete from its inception; no consideration; and failure of consideration; and with any one defense good, the judgment stands.

POINT ONE: THE CONGRESS HAS PROVIDED LIMITATION OF ACTIONS ON WRITTEN CONTRACT IN THE UNITED STATES COURT FOR CHINA IN TERMS OF SIMILAR PROVISION FOR THE DISTRICT OF COLUMBIA.

(a) **Biddle v United States**

With *Biddle v United States* (CCA 9, 1907) 156 F 759 began a gradually more assured and highly useful line of decisions in the United States Court for China. "The laws of the United States" to be there applied, and the qualifications of "suitable", "practicable", "applicable", which the court is empowered to determine, were, until *Biddle v United States,* most difficult to determine. Because that determination, especially with increased commerce with China, was too difficult for the consular officers sitting occasionally and quite informally, whose judicial authority was but a peculiar incident of their executive functions, President Theodore Roosevelt proposed that in place of numerous consular courts there be established one central court taking over all but justice of peace jurisdiction of consuls and with powers both federal and territorial, organized and having procedure adapted from that of United States District Courts. Such was the exigency over irregular consular administration of estates and inefficient consular jurisdiction of crimes (beach combers and bawdy-houses infesting otherwise exceptionally high class American commercial communities)

that extreme pressure developed in Congress itself demanding instant legislation. The legislation, as its date shows, June 30, 1906,* the last day of the session, was the same day signed by the President and appropriation was hurried through. This haste is evident from the very text of the Act, including, as it does, both administrative directions to consuls as to estates and judicial authorizations of rather mixed nature. In the first months the Court, although the able Attorney General for the Philippine Islands had been appointed Judge, experienced strong defiance of law-breaking elements and very serious embarrassment caused by want of specifically applicable law, so far as could be discovered. The laws of the United States and the common law were searched for law applicable to vagrancy, for example, in the still functioning consular courts, for law as to obtaining money on false pretenses, for law as to domicil, for law as to probate. In contrast, the British Supreme Court for China, also sitting mostly at Shanghai, established as early as 1866 and since then functioning, had simply to apply, not the laws of the British Empire or anything like federal-territorial-state law, but simply the law of England. This was in 1906. In 1907 this Circuit Court of Appeals decided *Biddle v United States.* The jurisprudence of that great opinion was a breaking of dawn, a light from the east for United States jurisdiction in China. The opinion was by De Haven, CJ, with whom were Gilbert and Ross, CJJ. Years afterward, conversation with Circuit Judge Gilbert about law practice in China occasioned his remarking

*Act Jun 30, 1906, 34 Stat 814; 22 USCA 191-202

that it had been expected later appeals would bring further definition of the rule. But *Biddle v United States,* fundamental and practical, everywhere met with the highest approbation, especially of the bench and bar in China. The present appeal of Chalaire v Franklin, we regret to observe, is the only appeal in 39 years since *Biddle v United States* that has questioned its application. No federal court has questioned it. Only once has it been cited, and there for an example, in the United States Supreme Court. In the United States Court for China it has been applied many hundreds of times. It is as beneficial to our fellow citizens residing and doing business in China as a principle of the Constitution is in their homeland. Yet in Chalaire v Franklin a practical application of *Biddle v United States* by a long experienced trial court is challenged as error and even described as arbitrary!

This singular contention, utterly isolated, rests upon objection that *Biddle v United States* was a criminal case, while Chalaire v Franklin is civil. The same reasoning put upon the greatest of constitutional law adjudications of the United States Supreme Court would minimize their benefits beyond recognition. Was not *In re Ross* in the Supreme Court also criminal? (1891) 140 US 453; 38 L ed 581. Appellant would reason that great authorities in international law like John Bassett Moore or in constitutional law like Frederic Coudert have been constantly mistaken as to *In re Ross! Moore, International Law Digest,* at sundry pages in volumes 1, 2, 3 and 5. *DeLima v Bidwell* (1901) 182 US 1; 45 L ed 1041.

Turning to the law reports of the United States Court for China known as Extraterritorial Cases, an examination of cases decided between the years 1907, *Biddle v. United States,* and 1926 (The same is true later.) almost every case is found to rest upon *Biddle v United States.*

At this point reference is requested to the Points and Authorities for the Motion to Affirm Judgment, pages 12-14, (A reprint follows.) where the appeals from the United States Court for China are listed.

(b) Consular Court Regulations were not statutes

In *Moore, International Law Digest,* vol. 2 at p. 617 folwg, the following views are expressed:

Attorney General Cushing, who had negotiated the original treaty with China: The power to make 'decrees and regulations' enabled the minister in certain respects to *legislate,* and served 'to provide for many cases of criminality, which neither Federal statutes nor the common law would cover'. Sep 19, 1855; 7 Op 495, 504.

Secretary of State Seward, having newly received a copy of the regulation prohibiting navigation by American vessels of the Straw Shoe Channel in the Yangtsze River: 'It is certainly judicious to avoid . . . the assertion of power in the minister to make that unlawful which was not forbidden by the laws of the United States or of China. Such a power is legis-

lative, while the act cited purports by its title and the general tenor of its provisions to confer only judicial power.' Feb 6, 1869; MS Inst. China, II. 46.

Secretary of State Fish, as to regulations, Japan, thought certain of them transcended the authority delegated to the Minister, an authority not extending to creation of new rights and duties. Dec. 20, 1870; MS Inst. Japan, I. 373.

Secretary of State Bayard, particularly as to limitations of actions in the regulations, China, said: 'I do not, it is true, regard this rule as a statute. Not only had Mr. Burlingame no power to enact a statute, as such, but the language of the rule shows that it cannot be regarded as a statutory enactment. . . . I hold, therefore, that Rule XV. of the Regulations of 1864, while not to be regarded as having the fixedness of a statute, is to be viewed as a rule of court expressing a principle open to modification by the court that issued it. It stands in the same position as do equity rules, . . . not as a statutory mandate, . . . but as a principle and regulation of practice which it is open to the court to expend or vary as the purposes of justice may require, above mentioned.

(Rule XV is the so called Statute of Limitations of the Consular Court Regulations, China, 1864)

Secretary of State Olney, referring to a regulation for rendition of an accused person from one consular district to another, China, 1897, observed: 'The power of the minister to make such decrees and regulations is limited to furnishing 'sufficient and appropriate remedies.', Feb 2, 1897; MS. Inst. China, V, 415.

These Secretaries of State were eminent lawyers and the matters before them for action required decisions, not generalities such as Mr Cushing had ventured. We are obligated to remonstrate against remarks in Brief for Appellant, pages 16 to 18; the trial court was well associated in holding the regulation not a statute.

(c) Obsolescence and eventual non-use of Regulations

Who may have been the draftsman of the mostly identical Consular Court Regulations, Turkey, 1862, and China, 1864, fully identical on limitations of actions, must probably remain obscure. What use there was in them has almost wholly passed. To comply with them at this time in their totality would set back the protection of citizens and the obligation to perform treaty to 1864 or more than 70 years.

After the war of 1914-18, housing conditions in Washington, D. C., continuing to be supervised by a Rent Commission, although the emergency had passed, a bill to enjoin enforcement of an order of the Rent Commission, the matter came eventually to the United States Supreme Court; Mr Justice Holmes delivered the opinion, and with the observation that "If about all that remains of war conditions is the increased cost of living, that is not, in itself, a justification of the act. Without going beyond the limits of judicial knowledge, we can say at least that the

plaintiff's allegations cannot be declared offhand to be unmaintainable, and that it is not impossible that a full development of the facts will show them to be true. In that case the operation of the statute would be at an end." "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though valid when passed."

Chastleton Corp v Sinclair (1924) 264 US 543, 547, 548; 68 L ed 841, 843

Repeal of statute by implication is not favored; but here it is not a statute that may have been repealed; it is merely a rule of court superseded by statute. The object of establishing the United States Court for China in 1906 was to improve our jurisdiction in China outright and thoroughly. The Act of 1906 itself in part goes into detail of procedure, and in other part authorizes the judge to modify and supplement the rules of procedure. It is the laws of the United States that are to be applied; the formalities of procedure are subordinate to the laws.

(d) In this treaty-legislative court the judge has special power to apply laws of the United States

But the jurisdiction "shall in all cases be exercised in conformity with said treaties and the laws of the United States now in force". The Statute of Limitations enacted for the District of Columbia was in 1906 a law of the United States to which the jurisdiction should conform. The Statute for Alaska was not such a law of the United States from the time "exclusive legislative jurisdiction" of Congress for Alaska closed, that is from August 24, 1912. Act of Congress Aug 24, 1912, 37 Stat 512, c 387, sec 1 and 3; 48 USCA 21, 23; Alaska Organic Act

That the United States Court for China is an arm of the executive branch of government in performance of its authority and obligation to conduct foreign relations, particularly of the jurisdictional phases of the treaties with China, will be granted. Its character as a legislative, rather than a constitutional court, is mentioned in connection with citation of *Biddle v United States* in the opinion written by Mr Justice Van Devanter in

Ex parte Bakelite Corporation (1929) 279 US 438, 450; 73 L ed 789, 793

where it is said:

"A like view has been taken of the status and jurisdiction of the courts provided by Congress for the District of Columbia. These courts, this court has held, are created in virtue of the power of Congress 'to exercise exclusive legislation' over the district made the seat of government of the United States, are legis-

lative rather than constitutional courts, and may be clothed with the authority and charged with the duty of giving advisory decisions in proceedings which are not cases or controversies within the meaning of article 3 (of the Constitution), but are merely in aid of legislative or executive action, and therefore outside the admissible jurisdiction of courts established under that article.

"The United States court for China and the consular courts are legislative courts created as a means of carrying into effect powers conferred by the Constitution respecting treaties and commerce with foreign countries. They exercise their functions within particular districts in foreign territory and are invested with a large measure of jurisdiction over American citizens in those districts. The authority of Congress to create them and to clothe them with such jurisdiction has been upheld by this court and is well recognized."

The power to apply laws of the United States "suitable", "practicable", "applicable" has gradually been better interpreted in the United States Court for China. A page by page examination of Extraterritorial Cases, covering the years 1906 to 1923, and of law office notes of subsequent cases, shows the progress of judicial upbuilding of the jurisdiction on foundation of *Biddle v United States.* In 1907, just before *Biddle v United States,* the first Judge of the Court, Judge Wilfley, having decided *United States v Biddle* (1907) 1 Ext Cas 120, holding obtaining money on false pretenses was an offense at common law (in this respect approved on appeal), observed in

In re Allen's Will (1907) 1 Ext Cas 92, 98

"To such an extent has the British jurisdiction in China been developed that there is almost no legislative or judicial phase of the law in force in England which, if necessary in China, has not its counterpart here. On the other hand "common law" and "equity" form the vague and indefinite description of the main law in force in respect to Americans in China." Yet in this very opinion and decision, holding domicil in China could be acquired by an American citizen, the reasoning and the demonstrating of practical necessity of so holding in order that this treaty-legislative jurisdiction should be effective in probate convinced the British courts both in China and in Turkey, changing the course of their decisions. On appeal the House of Lords approved.

Casdagli v Casdagli A C (1919) 145, 168

However, with hundreds of applications of *Biddle v United States* in the intervening years, including both civil and criminal matters, with some efforts to conform to *Biddle v United States* even to extent of dicta saying that laws common to the States were also "laws of the United States", and with some effort to apply a "more suitable" or "later" law, an extreme decision, now seen to be erroneous, and having general tacit disapproval from the beginning, was made in

United States ex rel Raven v McRea, Acting Clerk of Court (1917) 1 Ext Cas 655

Notwithstanding Congress had divested itself of exclusive legislative jurisdiction in Alaska from August 24, 1912, the United States Court for China held that

through the Act of Congress for Alaska, March 2, 1903, a "suitable" incorporating act had been provided. Incorporation, done in Alaska through executive officers, was to be accomplished in China "thru the machinery" of the United States Court for China! Citing *Biddle v United States,* Judge Lobingier said: "This is the doctrine now regularly applied by this court which has declared that:

> "extension results quite independently of the original purpose of the acts themselves. Thus Congress may enact a law for a limited area under its exclusive jurisdiction, such as Alaska or the District of Columbia; by its terms it may have no force outside of such area; but if it is 'necessary to execute such treaties' (with China) and 'suitable to carry the same into effect', it becomes operative here by virtue of the act of 1860 above quoted. Such we understand to be the doctrine announced by the Court of Appeals."
>
> *United States v Allen* (1914) 1 Ext Cas 326, 329;
>
> *In re Thacher's Will* (1916) 1 Ext Cas 524, 525

This reasoning we must regard as fallacious in respect to Alaska.

General Acts of Congress like the Code of Alaska when, by reason of setting up a territorial legislature Congress no longer has exclusive legislative jurisdiction in such territory, with result that such general Acts, to extent permitted in the organic act, may be modified by the territorial legislature, are no longer laws of the United States. If they were, the Court

would be obliged, by parity of reasoning, to apply in China any general Act of Congress for any former territory, prior to its being set up independently to legislate for itself. Thus the laws of the United States for the several western territories would become applicable in China.*

But the District of Columbia, as remaining under exclusive legislative jurisdiction of Congress, has, in the later decisions, but not without some aberrations, been applied. This is common knowledge among American citizens in China. It is also common knowledge that the Consular Court Regulations of 1864 have but a vestige of applicability. Every American citizen in China has for years known that the District of Columbia Code is commonly resorted to for laws applicable in the United States Court for China.

Apparently the theory of appellants and the theory of the Engelbracht case is that these Consular Court Regulations are not only special statutes but even

*"We were at first in doubt as to whether the initial words of the statute (35 Stat 711, c 250; Act of Mar 3, 1909, Vagrancy: defined; penalty, District of Columbia; now D. C. Code, Title 6, Section 291,—last paragraph); and compare (Rev Stat Sec 4101; 22 USCA 155,—Consular Courts, punishment of crime by fine or imprisonment, or both, 'at the discretion of the officer who decides the case' and 'according to the magnitude and aggravation of the offense') did not localize the offense and make the act inapplicable elsewhere than in the District of Columbia. But a re-examination of the statutes treated as applicable by the Court of Appeals (Biddle v United States) in announcing its doctrine that any pertinent act of Congress is in force here regardless of the limits within which it was originally intended to apply, convinces us that they are in principle no different from the statute here invoked. Moreover the Court of Appeals there applied acts which had been passed long subsequent to the Congressional extension of the 'laws of the United States . . . over all citizens' in China." Lobingier, J, in

United States v Osman (1916) 1 Ext Cas 540, 544

approving opinion of Thayer, J, in

United States v Grimsinger (1912) 1 Ext Cas 282, 285

NOTE: *Biddle v United States* (CCA 9, 1907), above mentioned, is reported at 156 F 759.

super-special,—statutes of a sort hitherto unknown, never repealable except by specific repeal. Only so could they be got rid of. That is, says appellant, the Minister to China, empowered by Congress, has legislated (and Attorney General Cushing, speaking in vacuo, says the Minister is empowered to legislate); and once this legislation from China is promulgated, even Congress is impotent to change it unless by specifically citing it and therewith denouncing it by chapter and section. Medes and Persians!! But, of course, there is some evidence internal to the Consular Court Regulations that they could not have attained a super-statutory dignity. If our friends who represent appellant continue to maintain the Consular Courts were thus panoplied with armor impenetrable by whatever shafts of sense and reason, the shades of Blackstone and Story, reading these Regulations to their amazement, would believe themselves being cleansed, as in purgatory, within the strange cacophonies of a very upside-down, un-Gilbertian "Iolanthe"!

If the peculiar and extremely spare provisions of the Consular Court Regulations of 1864 as to limitation of actions suffices for modernized American business conditions in China, how is it their incognito draftsmen did not also include a Statute of Frauds? a Statute of Uses? a Rule in Shelley's Case?

Of course the Consular Court Regulations are not statutes at all. They are at best rules of court by the Minister,—an officer empowered to adjudicate, but who is not known ever actually to have held court,—the chief executive officer of the United States in

China. If these regulations possess the vitality of statutes,—statutes that are so superior that, in accordance with

In re Ross (1891) 140 US 453; 35 L ed 581,

even the Constitution is powerless to apply to them, the United States entered in 1864 upon a most novel jurisprudence! And there we stick! Let us concede the Regulations may have had some steadying influence upon consular officers on the rare occasions for most of them when exigency compelled them to become, for the briefest time, consular judges. Let us concede the Regulations force of law in so far as they did not conflict with or make unavailable actual law. Beyond this no potency can rightly be ascribed to them.

Brief for Appellant (Bf Aplt 30, 10) mentions Section 5 of the Act of June 30, 1906, creating the United States Court for China,—that section dealing with procedure and requiring that the procedure of the Consular Courts, which the Court for China superseded in greater part, be followed in the Court for China, so far as applicable. If the test of being applicable does not leave the Court for China discretion to say when and in which respect, what could have been intended? And, may we add?—is the right use of such discretion open to review?

For the very wide areas and the diversities of jurisdictions that constitute the reviewing jurisdiction of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and because of the century-long close commercial relations of San Francisco and

the ports of Eastern Asia, there is a form of judicial notice, even if not a notice on part of some counsel, that the Federal Government has always provided through Congress for protection and advancement of American interests, and it would appear most natural and reasonable that the law of the District of Columbia, so far as suitable and practicable, should be resorted to for those purposes rather than the law of the Territory of Alaska. And this must, in natural course of events following *Biddle v. United States,* come about. Surely it is not unknown at San Francisco that the one code of law commonly used by and upon the desk of every American attorney at Shanghai is the District of Columbia Code. The Consular Court Regulations have been moribund these thirty years. Why resist at San Francisco those practicing at the bar in Shanghai and benefiting in practice from not at all mourning the Consular Regulations of 1864, at least in most of their body long since departed?

POINT TWO: IN ADDITION TO GOOD DEFENSE ON LIMITATION OF ACTIONS THE ANSWER WELL PLEADED OTHER GOOD DEFENSES, TO WIT:

(a) LAWFUL TERMINATION OF AGREEMENT INCOMPLETE FROM ITS INCEPTION

(b) NO CONSIDERATION

(c) FAILURE OF CONSIDERATION

AND WITH ANY ONE OR MORE DEFENSES GOOD, THE JUDGMENT STANDS

If plaintiff-appellant shall have qualified for review and, further, shall have prevailed as to the Statute of Limitations, he will, as in the second part of his Brief, desire this Court of Appeals to consider the merits as shown in the pleadings.

Judgment on pleadings is in most cases unfavored. In its more favored position it is upon an agreed case where no issue of fact exists. In a controversial case, especially such as Chalaire v Franklin with pleadings not confined to ultimate but including evidentiary allegations, the very purpose of trial, the findings of fact, is frustrated, and, also, in such case, the rulings on law are obviated. The judge, as a consequence, is to change over to the rôle of arbitrator, a rôle which he must find extremely restrictive of judicial power.

In the instant case defendant pleaded affirmatively and plaintiff omitted to counter-plead. To one who reads the pleadings observantly there is much more of fact within the pleadings than the mere words state. The times and circumstances; two lawyers in partnership, closing that partnership with such non-sufficient

inclusion of terms as probably neither of them would allow himself to overlook were he advising clients; the friendly and informally expressed expectations and inducements synchronous therewith; a probably long extended course of friendly composition; very likely a proposal to arbitrate, and eventual realization that a competent and impartial arbitrator would be difficult to find; then a newly appointed judge, coming to a foreign jurisdiction, and fresh upon his coming to the bench, and with only a few members of the bar in active practice, one of the members is sued by a former member over the closing of a law partnership. Of all these facts and probable facts the trial judge had judicial notice. For enabling the judge to acquire and use judicial notice of conditions of American life and business in China his term of office is made ten years, and he is eligible for re-appointment.

These matters in mind, we believe it likely the Court of Appeals will not be interested favorably to consider the merits. If, however, the Court of Appeals is interested, we shall request leave to reply for Appellee orally and with appropriate reference to authorities sustaining the propositions that there was here:

(a) Lawful termination of agreement incomplete from its inception;

(b) No consideration;

(c) Failure of consideration

Each such affirmative defense was well pleaded, was not anticipated in the complaint and was not replied to. Wherefore, any one or more defenses being good, the judgment stands.

Equally with the foregoing and part of Brief for Appellee is the following:

MEMORANDUM BY FRANKLIN & HARRINGTON, OF COUNSEL, SHANGHAI, CHINA

I. THE LAW CLAIMED BY US TO BE APPLICABLE:

Title 24, ch. 12, sec. 341, of the District of Columbia Code provides that no action shall be brought upon any simple contract, express or implied, after three years from the time when the right to maintain any such action shall have accrued. (March 3, 1901, 31 Stat. 1389, ch. 854, sec. 1265, June 30, 1902, 32 Stat. 542, ch. 1329.)

II. WHY ABOVE LAW IS APPLICABLE:

"Such jurisdiction in criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute said treaty, extended over all citizens of the United States in China, (and over all others to the extent that the terms of the treaty justify and require) so far as such laws are suitable to carry said treaty into effect."

1848, August 11, 9 U. S. Stats. at Large, p. 276, c. 150, sec. 4. Re-enacted 1860, June 22, 12 U. S. Stats. at Large, p. 72, c. 179, sec. 4.

These Acts afford the basis of American jurisprudence in China.

See *U. S. ex rel. Raven v. McCrea*, 1 Extraterritorial Cases 655, 659 (1917).

The law so "extended" is the law promulgated in the Acts of Congress.

> See *U. S. v. Allen,* 1 Extraterritorial Cases 308, 311 (1914).

"Thus Congress may enact a law for a limited area under its exclusive jurisdiction such as Alaska or the District of Columbia; by its terms it may have no force whatsoever outside such area; but if it is 'necessary to execute such treaties' (with China) and 'suitable to carry the same into effect' it becomes operative here by virtue of the Acts above cited."

The Acts of Congress relating to the District of Columbia are among the laws of the United States so extended to this jurisdiction.

> *U. S. v. Biddle,* 1 Extraterritorial Cases 120 (1907) affirmed in above respect, (reversed on the information and on merits) by the C.C.A., 9th Circuit in 156 Fed. 759. *Cavanagh v. Worden,* 1 Extraterritorial Cases 365, 370. *Roberts v. Roberts,* 1 Extraterritorial Cases 916. *Finance Bank v. Luebbert's Pharmacy,* Case No. 3682, Civil No. 1677, (1934) U S. Court for China.*

That Congress did not have China in mind when the Statute was enacted is immaterial. *Biddle v. U. S.,* supra.

*A certified copy of this opinion has been filed on behalf of appellant in the instant appeal.

III. REFUTATION OF OPPOSING ARGUMENTS:

It is inescapable that the provisions of the District of Columbia Code apply if applicable. Compare *Finance Bank v. Luebbert's Pharmacy,* supra. There is no question but there should be a Statute of Limitations applicable to this jurisdiction. Counsel for plaintiff admits this by claiming that the Statute of Limitations contained in the old Consular Court Regulations is applicable. The terms of the Statute are not important; the question is whether there is a Statute applicable. That the period of limitation for actions for breach of a written contract varies in the several states and the several federal jurisdictions is irrelevant. The question is whether a statute of limitations enacted by Congress is suitable and therefore is applicable in this jurisdiction. It is unimportant whether the Statute provides a period of limitations of three years or six years.

It is argued by counsel for plaintiff that the three year period of limitations contained in the District of Columbia Code of 1901 had been the law in the District of Columbia for a century prior to that date by virtue of an Act of Congress extending the laws of Maryland over the District of Columbia and that therefore the Consular Court Regulations of 1864 could never have been enforcible because in 1864 when the Consular Court Regulations were promulgated the Act of Congress was in force adopting the law of Maryland as the law over the District of Columbia. We submit that an Act of Congress extending the law of Maryland over the District of Columbia is not

an Act of Congress within the meaning of that term as used in the Statutes and Decisions making the Acts of Congress applicable to the United States Court for China. An Act of Congress extending the laws of Maryland over the District of Columbia is not the same as an Act of Congress enacting a Statute of Limitations for the District of Columbia. Until the enactment of the District of Columbia Code there was no law enacted by Congress providing a Statute of Limitations for the District. It is therefore immaterial what law applied in the District of Columbia prior to the enactment by Congress of the District of Columbia Code.

The case of *Gwin v. Brown,* 21 App. D.C. 295, relied upon by counsel for the plaintiff, is distinguishable, first, because in that case two *statutes* of limitations were involved while in the present case we are concerned with only a statute and a rule of court, (see Hinckley on American Consular Jurisdiction in the Orient, p. 55, quoting Bayard, Secretary of State); and second, because the cause of action in the instant case was not pending when the District of Columbia Code was enacted in 1901. Therefore the doctrine of Stare Decisis is inapplicable in regard to the construction placed by the District of Columbia Court upon the effect of the enactment of the 1901 Statute.

In 1933, in the case of the *Meh Teh v. Yangtsze Rapid Steamship Company,* Cause No. 3342, the United States Court for China held the Statute of Limitations of the District of Columbia applicable and from the Bench dismissed one of the causes of

action in the plaintiff's complaint. In the case of *Sun and Mih v. American-Oriental Bank,* Cause No. 3520, the Court by way of dictum stated that the Consular Court Regulations in regard to the limitation of actions should prevail. This statement was not the basis of the determination of the case as the plaintiffs had agreed to have their cash guarantee deposit used as a part of Dello & Company's margin account with the Bank and by so doing they assumed the risk that such deposit might be appropriated by the Bank in the event Dello & Company failed to carry out its obligations under various letters of credit. The reference to the Statute of Limitations could not possibly be construed as the ratio decidendi of the case.

Under the common law a doctrine had grown up to the effect that while *a dictum* may be entitled to great respect on account of the learning or general accuracy of the judge who pronounces it, it is not the judicial determination of the court and, therefore, is not entitled to the force and effect of precedent.

> *Black, Interpretations of Laws* (1896), 394, Sec. 148, note 83; *Wells, Res Adjudicata and Stare Decisis* (1879), c. XXXIX, p. 527; 15 *C. J.* 950, sec. 344; *Crescent Ring Co., Inc., v. Traveler's Indemnity Co.,* 102 N.J.L. 85, 132 Atl. 106 (1928).
>
> "A dictum is an expression of opinion in regard to some point or rule of law, made by a judge in the course of a judicial opinion, but not necessary to the determination of the case before the court. It may either be put forth as the personal opinion of the judge who delivers the judgment of the court, or introduced by way of illustration, argu-

> ment, or analogy, but not bearing directly upon the question at issue, or it may be statement of legal principle over and above what is necessary to the decision of the controversial questions in the case."
>
> *Black, Interpretation of Laws,* 394, sec. 148.

The general rule broadly stated by the United States Supreme Court is that to make an opinion a decision "there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties."

> *Carroll v Lessee of Carroll* (1853) 16 How 275, 287; 14 L ed 936, 941; *Cohens v Virginia* (1821) 6 Wheat 264, 399; 5 L ed 257, 290; *United States v County of Clark* (1877) 96 US 211, 218; 24 L ed 628, 630.

Even if the dictum in the case of *Sun and Mih v. American-Oriental Bank,* supra, was a definite ruling and part of the ratio decidendi of the case it would still not be binding on the United States Court for China as it is not the decision of an appellate court. (For the same reason obviously it would not be binding upon the Circuit Court of Appeals.) It is not a question of the application of the historical declaration that "The House of Lords never overrules itself." When a rule or principle of law has been fully recognized by the Supreme Court it should not be overruled unless it is palpably wrong or has been changed by legislative enactment.

Lemp v. Hasting, 4 G. Greene 448 (Iowa). See also *State v. Silvers* 47 N.W. 772; *Kapp v. Kapp* 99 Pac. 1077; *State v. Taylor* 53 Atl. 392; *Fidelity & Deposit Company v. Nisbet,* 46 S.E. 444.

A single decision will not afford a basis for the application of the doctrine of Stare Decisis.

McDonald v. Davey, 22 Wash. 366, 60 Pac. 1116, 1117; *Kimball v. Grantsville City,* 19 Utah 368, 57 Pac. 1, 8, 45 L.R.A. 628, 635; *Garland v. State of Washington,* 232 U.S. 642, 646; 58 L. ed. 772; *Truxton v. Fait & Slagle Co.,* 42 Atl. 431, 438. See Black Interpretation of Laws, 411 sec. 153.

A single decision is not necessarily binding.

11 Cyc. 745.

"More than one decision," says Judge Martin in Smith v. Smith, 12 La. 441, "is required to settle the jurisprudence on any given point or question of law." "We have often said," said this Court in Lagrange v. Barre, 11 Rob. (La) 302, "it requires more than one decision to establish a jurisprudence."

Quaker Realty Company v. Labasse, 131 La. 996, 1008, 60 So. 661, 665.

If there is only a single decision on a question and the decision is plainly erroneous and no evil results would flow from a change, then the Court should adopt the better construction of the Statute.

McFarland v. Pico, 8 Cal. 626; *Remey v. Iowa Cent. Ry.,* 116 Iowa 133, 89 N.W. 218.

Plaintiff asserts that the Consular Regulations have not been modified, supplemented or superseded. Formal action to accomplish this is not necessary. See *Finance Bank v. Luebbert's Pharmacy,* Cause No. 3682, Civil No. 1677, United States Court for China (1934). The Maryland Statute of Limitations of 1715 in force in the District of Columbia was superseded by the District of Columbia Code, which took effect on January 1, 1902, without being specifically repealed.

McKay v. Bradley, 26 App. D.C. 449, 451.

It is submitted that the Consular Court Regulations were likewise superseded by the District of Columbia Code without being specifically repealed. This is borne out in the following excerpt:

> ". . . and if neither the common law nor the law of Equity or Admiralty, nor the Statutes of the United States, furnish appropriate and sufficient remedies, the ministers in those countries, respectively, shall by decrees and regulations which shall have the force of law, supply such defects and deficiencies."
>
> R.S. sec. 4086; Act June 22, 1860 c. 179, 12 Stats. at Large, p. 72.

The same problem was before the United States Court for China in the case of *Finance Bank v. Luebbert's Pharmacy,* supra. The District of Columbia

Code provided that 8% interest could be charged* and that Consular Court Regulations allowed 12% on judgments. The Court said: "The old Consular Regulations which were continued on the creation of this court except where changed by rule of court, allowed interest at 12% after judgment based on any sort of a demand or debt." The Court, holding that the provisions of the District of Columbia Code were applicable, said: "Since the Biddle case, the D. C. Code by policy and usage of this court has become the primary legislation for its jurisdiction. . . ." It is submitted that a repeal of the Consular Regulations can be implied from the "policy and usage" referred to.

Counsel for plaintiff refers to the Extraterritorial Remedial Code of Judge Lobingier and its provisions relative to limitations of actions. This Code was never promulgated.

The principal case relied upon by the plaintiff is that of the *United States v. Engelbracht,* 1 Extra-

*NOTE: In the 74th Congress, First Session, a bill was introduced as S 3097: Relating to interest and usury affecting parties under the jurisdiction of the United States functioning in countries where the United States exercises extraterritorial jurisdiction; it was referred to the Judiciary Committee.

For the Committee, Mr Hastings, Report No. 1081, May 13, 1935, stated: "It appears that United States courts, located in these countries, have held that such courts are bound by the laws of the District of Columbia upon this subject, which law fixes the legal rate of interest at 6 per cent.

"If this act is passed, it will permit persons to charge the same rate of interest as is fixed by the particular country in which the court is located.

"The other parts of the bill are copied from the District of Columbia law, with, of course, the necessary changes. This was deemed advisable because the courts in those countries have been following this law.

"A similar provision, applicable to banks, is provided in the Banking Act."**

It appears an amendment was accepted to effect that the "rate shall be the legal rate of interest provided by the laws of the country in which such jurisdiction is exercised; Provided, however, That in no case shall such rate of interest be more than 12 percent."*** [FEH and WHL, San Francisco]

**Apparently referring to 22 USCA 371b.

***Notwithstanding the foregoing the indexes of USCA August and October 1935 Special Pamphlets, Acts of 74th Congress, Jan 3, 1935 to end of Session, do not indicate that the bill became law.

territorial Cases 169. This case is distinguishable because the Statute of Limitations involved in that case referred to criminal cases instituted by indictment or information. The opinion of the Court itself is careful to point out that indictments are not used in the United States Court for China and the informations filed are quite different from the informations contemplated by the Federal Statute in question. Furthermore, the same argument with reference to the *Engelbracht* case on the question of Stare Decisis could be made as was made above with reference to the case of *Sun and Mih v. American Oriental Bank.*

This case does not involve the interpretation of the law but only its application. This being a unique jurisdiction and far removed, the local judge is best qualified to determine what statutes are applicable.

The foregoing Memorandum was prepared by Counsel at Shanghai, China.

Dated: December 20, 1935

Respectfully submitted,

FRANK E. HINCKLEY

W. H. LAWRENCE

Attorneys for Appellee

APPENDIX I

IN THE UNITED STATES COURT FOR CHINA

FINANCE BANKING CORPORATION, LTD., Plaintiff, vs. LUEBBERT'S PHARMACY, FED. INC., Defendant, and MILLINGTON, LIMITED, et al., Intervenors	Cause No. 3682 Civil No. 1677 Filed at Shanghai, China, July 10th, 1934 William T. Collins Clerk.

OPINION

Plaintiff seeks to foreclose its mortgage, upon all the assets of the defendant, in the sum of $45,902.52 local currency, with interest at the rate of 12% per annum. The defendant corporation is in default, but certain unsecured creditors and certain majority stockholders of the corporation seek to intervene to ask for a receiver and to interpose the defense of usury based upon the 12% rate and other alleged charges.

Although usury is a defense personal to the defendant, yet under circumstances similar to these courts of equity usually permit creditors and stockholders to raise the question of interest when the defendant fails to do so. This appears to be the modern tendency.

The precise and narrow issue is what rate of interest can be enforced against defendants in this court,

and it is strange that after all these years the issue should be presented as a new and unsettled one. In 1923, in the case of Massey vs. Fernbach, No. 2177, this court held specifically that the District of Columbia Code governed the matter in this jurisdiction, but erroneously applied a maximum rate which had previously been reduced in the District of Columbia. The intervenors contend there is no alternative but to follow the District of Columbia Code, while plaintiffs vigorously assert it is not adapted to local conditions and therefore not in force under the terms of the Congressional Act which extended laws of the United States to this jurisdiction, but recited that "in all cases where such laws are not adapted to the object * * * the common law * * * shall be extended in like manner". Plaintiff reminds the court that limitations on interest rates were unknown at common law but that usury is purely of statutory creation, and urge the conclusion that in this jurisdiction "the sky is the limit". It is argued in this connection that the local prevailing rate of interest limit does not foster commerce.

The District of Columbia Code, in brief, provides the rate of interest in the absence of express contract shall be 6%, but that parties to a written instrument may contract for interest at 8%. The penalty against a creditor for charging more is forfeiture of all interest. Under the so called "Loan Shark" Act of the District of Columbia, which is not pertinent in this cause, 12% may be charged on small loans. The old Consular Regulations, which were continued on the creation of this court except where changed by rule of court, allowed interest at 12% after judgment based on any sort of demand or debt. Although this Consular Regulation seems never to have been modified formally, it has apparently been ignored for many years.

Since the Biddle case, the District of Columbia Code by policy and usage of this court has become the primary legislation for this jurisdiction, and consequently the question here apparently centers on adaptability. Habitually to test adaptability too freely tends to put this tribunal in the anomalous position of both legislator and court. The task should be undertaken with great caution and with inquiry into the desirability, wisdom or merits of legislation. Under the guise of testing the adaptability of the laws of the United States, this court should not reject appropriate statutes merely because it might wish they had been drawn differently. In this jurisdiction we may not have the benefit of choosing to be bound by only such laws of the United States which we like and of ignoring what we dislike.

No formal evidence was offered to prove the prevailing rate of interest charged for ordinary and commercial loans in this community, although able counsel on both sides argued these matters of fact. So far as common knowledge goes the interest rates charged Americans vary in this jurisdiction but are not materially different from the District of Columbia and there seems to be no established rate. It is true usury was unknown at common law, but universal legislation on the subject has so fixed our policy that it is hard to conceive of a jurisdiction without an interest limit. The Congressional attitude toward usury may be gathered from Sec. 85, Title 12, U.S.C.A. which provides that when no rate is fixed by the laws of the State or Territory or District, a National Bank may charge not exceeding 7%.

In view of the foregoing, it is decided that the District of Columbia Code governs the rate of interest which shall be enforced against defendants in this court.

In view of the uncertainty which has existed, it is clear that plaintiff had no illegal intent to make a usurious contract, and consequently the forfeiture provision of the District of Columbia Code will not be enforced, but interest in excess of 8% will be eliminated after computing the true amount of the debt. A receivership appears undesirable at this stage, but a decree of foreclosure will be entered and any surplus over judgment and costs arising from the foreclosure sale will be paid into the registry of the court, and the court will retain jurisdiction of the cause for such further proceedings as may be deemed advisable.

Milton J. Helmick

Judge.

Dated this 10th day of July, 1934.

APPENDIX II

Excerpt from opinion of United States Court for China (unreported) given October 5, 1933, Milton D. Purdy, Judge, Cause No. 3520, *Sun and Mih v American-Oriental Banking Corporation:*

> "Of course Congress has undoubted right to prescribe whatever limitations it deems proper with respect to both civil and criminal actions cognizable in the United States Court for China; but it seems to me that Congress never intended to provide limitations of actions in the United States Court for China by such roundabout and indirect manner as through the instrumentality of the Code of the District of Columbia.
>
> "The Consular Court Regulations with respect to the limitation of actions were in force and operation in the American Consular Courts in China for more than thirty years prior to the establishment of the United States Court for China. Such Rules and Regulations were admittedly suitable and proper when framed and promulgated by Minister Burlingame in 1864. At that time there was no general law of the United States, nor is there one now prescribing periods of limitation for the prosecution of civil actions between private parties. It was therefore appropriate, if not absolutely necessary, that some such rule as the one in question be prescribed and included in the Consular Court Regulations which were published by the Minister. Again, these Rules and Regulations seem to me to have been in effect ratified and approved by Congress. They

were published and promulgated by the Minister under authority conferred upon him by Sec. 4117 of the Revised Statutes, and they were required by Sec. 4119 of the Revised Statutes to be transmitted to the Secretary of State and by him laid before Congress for annulment or modification. (R. S.—Sec. 4118/4119) And if we now turn to the provisions of the Act of Congress establishing the United States Court for China we find the following:

> "The procedure of the United States Court for China shall be in accordance, so far as practical, with the procedure prescribed for Consular Courts in China in accordance with Chapter 2 of this Title."

[*This is not a correct copy of the part of the Act that presumably was in mind. Attorneys for Appellee, Dec. 20, 1935.*] That is to say, in accordance with Sec. 4117 of the Revised Statutes (22 U. S. C. A.—Sec. 146) which was the very provision of law under and pursuant to which Minister Burlingame in 1864 adopted and published the Consular Court Regulations for China.

"Taking all these matters into consideration I am satisfied that the limitation of six years contained in the Consular Court Regulations for China is the law of this jurisdiction with respect to the period within which a contract may be prosecuted. I therefore hold that this action has not been barred by the Statute of Limitations as claimed by the defendant."

APPENDIX III

Comment on *Meh Teh Co v Yangtsze Rapid SS Co* (1932) (unreported), United States Court for China

Excerpt from copy of "Memorandum Brief in Support of Motion for New Trial" by Attorney for Plaintiff in Chalaire v Franklin in the United States Court for China, the case now No. 7753 in the Circuit Court of Appeals, Ninth Circuit. In the trial court the case was Cause No. 3628, Civil No. 1659. Referring to *Sun and Mih v American-Oriental Banking Corporation* (Supra, Appendix II) the brief continues:

> "Indeed, the six year period of limitation had become so deeply grounded in the procedure of this jurisdiction that, so far as counsel is aware, neither the United States Court for China nor any Consular Court had ruled in favor of any other period until December 14, 1932, when your Honor's immediate predecessor, Judge Purdy, in Meh Teh Co. v. Yangtsze Rapid S. S. Co., Cause No. 3342, for the first and only time applied the three year limitation of the D. C. Code. Judge Purdy apparently thought the question was one of first impression, and he gave an off-hand opinion from the bench. As stated above, however, the same Judge, about eight months later, on October 5, 1933, in a more carefully considered and written opinion, in C. E. Sun and W. D. Mih v. American-Oriental Banking Corporation, Cause No. 3620, reversed the former ruling by declaring that the six-year limitation of the Regulations takes precedence over the three year period of the D. C. Code of 1901."

REPRINT

United States Circuit Court of Appeals
Ninth Circuit

Appeal from
United States Court for China

WALTER CHALAIRE,
Appellant

v

No. 7753

CORNELL S. FRANKLIN,
Appellee

MOTION TO AFFIRM JUDGMENT

Attorneys for Appellee: Frank E. Hinckley and W. H. Lawrence, both of San Francisco, California. Of Counsel: Franklin & Harrington, Shanghai, China.

PERNAU-WALSH PRINTING COMPANY, SAN FRANCISCO

United States Circuit Court of Appeals

Ninth Circuit

Appeal from

United States Court for China

WALTER CHALAIRE,

Appellant

v

No. 7753

CORNELL S. FRANKLIN,

Appellee

MOTION TO AFFIRM JUDGMENT

Appellee respectfully presents this motion to affirm, stating as facts and objects hereof:

The Transcript of Record shows:

Amended complaint

Answer to amended complaint, with affirmative defenses

Motion of plaintiff, appellant here, for judgment on the pleadings

"Complaint will be dismissed", which were words at close of opinion, September 14, 1934

Judgment dismissing complaint, November 26, 1934

Exception to judgment, December 15, 1934

Affirmance, rather than dismissal, is sought, affirmance being in line with authority.

As grounds of this motion appellee assigns:

One: An appeal qualifying for hearing and further consideration is wanting, since

(a) There was failure of essential appellate procedure prior to filing transcript of record; and

(b) Omission of replication, then moving for and obtaining judgment on the pleadings without requesting and excepting to, before judgment, special findings and rulings, precluded obtaining basis for appeal.

Two: On above stated grounds for dismissal of appeal, and on face of record free of reversible error, there is precedent that the judgment be affirmed.

Herewith are notice, and points and authorities.

Dated: December 20, 1935

Respectfully presented,

Frank E. Hinckley

W. H. Lawrence

Attorneys for Appellee

NOTICE

Messrs McCutchen, Olney, Mannon & Greene
Farnham P. Griffiths, Esquire
George E. Dane, Esquire
Attorneys for Appellant

You are hereby notified that upon opening of usual session on December 20, 1935, or as soon thereafter as may be heard, we will present above motion to affirm judgment.

Frank E. Hinckley
W. H. Lawrence
Attorneys for Appellee

Due service of above motion to affirm judgment, and receipt of copy thereof and of copy of points and authorities, December 14, 1935, are hereby admitted.

McCutchen, Olney, Mannon & Greene
Farnham P. Griffiths
George E. Dane
Attorneys for Appellant

POINT ONE (a): AN APPEAL QUALIFYING FOR HEARING AND FURTHER CONSIDERATION IS WANTING, SINCE THERE WAS FAILURE OF ESSENTIAL APPELLATE PROCEDURE PRIOR TO FILING TRANSCRIPT OF RECORD.

In the judgment (Tr 24, 2 and 7) dismissing complaint the Court noted: "plaintiff excepts". No earlier indication of exception occurs. Thereafter by 19 days, and with no showing of service on defendant or of request for ruling of court, plaintiff filed "Exception to Judgment Dismissing Complaint". How these measures, first to last, could entitle plaintiff to appeal is a large question.

It may be that having proceeded by motion for judgment on pleadings, and with motion granted and judgment made, plaintiff apprehended he had forfeited right to request findings and rulings in course of trial. He had. But he appears to have overlooked the situation that course of trial would close with judgment, whereas at the end of the opinion (Tr 23, 8), rendered 73 days before judgment, the Court had stated: "Complaint will be dismissed". This definitely informed plaintiff what the judgment would be. It was of nature of order for judgment. In federal practice a judgment not required to be signed by the Judge would in due course have been entered by the Clerk, but before this entry and within time fixed in federal practice plaintiff could at least have requested general finding and ruling of the court on the request and could have reserved exceptions thereto. The failure to do so in this case we must regard as fatal to essential procedure for appeal.

Also in the substance of the "Exception to Judgment" there is failure fatally against right to appeal. The effort is to specify. Eight supposed specifications are made. The same eight, in same language, appear later in the record as assignments of errors. One of these, an error of a 2 instead of a 3 in the tens of a month, is paltry. (Bf Aplt 8, 5 and 11). Three others are not used in Brief for Appellant; hence abandoned. Of the four others, two are but reciprocal to the other two. The specification placed first is that the Statute of Limitations applicable in China is Section 83 of the Consular Court Regulations of 1864, and not that applied in the judgment, to wit, the District of Columbia Code, Title 24, Section 341. To claim this for exception the assumption is ventured, an assumption excluded by law, that the opinion is part of the judgment, for it is not in the judgment, but in the opinion that the District of Columbia Code is accepted by specific reference. Of course the opinion, by mention in the judgment or in any other way, cannot be taken as integrated into the judgment. Besides, when plaintiff omitted before judgment to request special findings and rulings or at time of judgment to request a general finding or ruling, he passed by his procedural opportunities. Yet in a general finding or ruling nothing could have been added to substance. It was only an exception of general nature he could then save.

Appeals from China are regulated by procedure from District Courts, so far as applicable.

Act of Congress Jun 30, 1906, 34 Stat 814, Sec 3; 22 USCA 194

In a case from China in which no exception was made until nearly 60 days after judgment (In the instant case 92 days after opinion of the Court stated that judgment would be against the party who is appellant) this Court of Appeals said:

> "It would seem to be a simple matter to conform to the established procedure and practice."
>
> *China Press v Webb* (1925) 7 F 2d 581, 583; Gilbert, *Hunt,* Rudkin, CJJ

> "To obtain a review by an appellate court of the conclusions of law a party must either obtain from the trial court special findings which raise the legal propositions, or present the propositions of law to the court and obtain a ruling on them. . . . These rules necessarily exclude from our consideration all the questions presented by the assignment of errors except those arising on the pleadings."
>
> *Fleischmann Constr Co v United States* (1926) 270 US 349, 356; 70 L ed 624, 629; Mr Justice *Sanford*

It is questionable whether there is, strictly, in this case any fact whatever, even those well pleaded, open to appellate review.

> "In the case at bar it is clear, we think, that if we pass upon the questions of sufficiency of the evidence to justify the judgment, we will be in

> effect considering an exception which was not in fact made, upon a question which was not even presented for the consideration of the trial court at the time fixed by law therefor."
>
> *First Natl Bank of San Rafael v Philippine Refining Corporation of New York* (1931) 51 F 2d 218; *Wilbur* and Sawtelle, CJJ, Neterer, DJ

Appellant's Brief, however, devotes more than eight pages (33-42) to argument on particulars of fact alleged in the pleadings.

However, we understand that in addition to the above authority against reviewing evidence where proper appeal has not been laid, there is special reason in the instant case for not bringing alleged facts set forth in the complaint into an assignment of errors; for, on motion by plaintiff, as here, for judgment on the pleadings, the allegations of the answer by defendant are deemed admitted. Fair turnabout restrains also the defendant because of his motion of like nature; but this does not apply, we think, to the answer in its Paragraph 3, and certainly not to the so designated First, Second and Third Separate and Distinct Defenses (Tr 16-18), the Third being on the Statute of Limitations. The two motions for judgment on the pleadings were distinctly independent one of the other. If then any matter of fact in the pleadings has become reviewable, the answer from Paragraph 3, inclusive, contains matter of fact which plaintiff is deemed to have admitted, being, as the opinion recites, "new matter by way of affirmative defense".

> *Mara v United States* (1931) DC SDNY, 54 F 2d 397, 400; Woolsey, DJ

POINT ONE (b): AN APPEAL QUALIFYING FOR HEARING AND FOR FURTHER CONSIDERATION IS WANTING, SINCE OMISSION OF REPLICATION, THEN MOVING FOR AND OBTAINING JUDGMENT ON THE PLEADINGS WITHOUT REQUESTING AND EXCEPTING TO, BEFORE JUDGMENT, SPECIAL FINDINGS AND RULINGS, PRECLUDED OBTAINING BASIS OF APPEAL.

The common law applies generally in United States jurisdiction in China. Affirmative defenses not anticipated in the complaint were pleaded, with verification. Plaintiff omitted counter plea of any nature. He then moved for judgment of the pleadings. Judgment against him followed. It is plain that although no one of the defenses is mentioned in the judgment, at least one of them, which one or more it does not matter, was adjudged good.

> "But where the plea introduces new matter and does not conclude to the country, but concludes with a verification, a replication must be made if plaintiff does not demur."
>
> 49 *CJ* 322, Sec 393

There was verification, conforming to practice in the China jurisdiction, and while it could be also considered that there was "conclusion to the country", that jurisdiction having no jury, had no "country" to "conclude to"! Anyway, the significance to plaintiff is that with affirmative defenses unchallenged and getting judgment on the pleadings, he is without saving of proper exceptions on which to obtain appeal.

POINT TWO: ON ABOVE STATED GROUNDS FOR DISMISSAL OF APPEAL, AND ON FACE OF RECORD FREE OF REVERSIBLE ERROR, THERE IS PRECEDENT THAT THE JUDGMENT BE AFFIRMED.

If the Circuit Court of Appeals, after considering the foregoing statement of grounds for dismissal and being satisfied that on face of the record there is not apparent reversible error, shall be disposed to grant a motion to dismiss, we will respectfully request that, instead, judgment be affirmed.

In thus affirming we understand that approval of the opinion of the trial court as expressing a view of the law is not to be inferred. In a comparable situation a petition to the United States Supreme Court for a writ of certiorari, granted or denied, in no way indicates approval or disapproval, but only that an apparent right of review is or is not recognized. (Only one petition for writ of certiorari from this Circuit Court of Appeals to the Court for China is found in the reports (*Curtis v Wilfley,* Judge (1908) 163 F 893); it was denied.) In a large proportion of the cases on review from China defect in preparing for appeal has prevented full measure of review. What the Court of Appeals held as to those parts of the appeals that were reviewable cannot be taken as showing what it would have decided on the non-reviewable parts. The appellate opinions show the disposition of the reviewing court to be considerate of the special difficulties of extraterritorial jurisdiction. Appeals are entertained to extent the law permits. The line of decisions on appeal to the Circuit Courts of Appeals throughout the United States we believe favors affirmance rather than dismissal in cases of the nature of the instant case.

In the United States Supreme Court an appeal of this description would, we believe, not be dismissed but affirmed.

In *James v Bank of Mobile,* cited below, in error to the Circuit Court for the District of Louisiana, on motion to dismiss, the Supreme Court said in opinion by Mr Chief Justice Chase:

> "The record in this case contains nothing but the declaration; the plea of the general issue; the proof of the protest of the bill of exchange indorsed by the defendant, and notice to him of non-payment, and judgment of the court in favor of plaintiff. There is no bill of exceptions, and nothing upon which error can be assigned.
>
> "But the regular course, in cases of this description is to affirm the judgments. The appeal is regularly here, and cannot be dismissed for want of jurisdiction. The motion, therefore, must be denied."
>
> *James v Bank of Mobile* (1869) 7 Wall 692, 693; 19 L ed 275

In *Gonzales v Buist,* cited below, on appeal from the District Court of the United States for Porto Rico, the Supreme Court, in opinion by Mr Chief Justice White, said:

> "There is nothing shown by the record which we can review, since what is denominated findings of fact is not such in legal effect, and the record does not contain any rulings of the court, excepted to upon the admission or rejection of evi-

dence. . . . No error being apparent on the record, the judgment . . . must be and it is affirmed."

Gonzales v Buist (1912) 224 US 126; 56 L ed 693, 695

In *Squibb & Sons v M. Chemical Works,* (cited below, on certificate from the Circuit Court of Appeals, Eighth Circuit, a question was:

"Where, on an appeal properly in this court, the appellee contends that one of the assignments of errors has been abandoned and all others are not presentable because defective either as assignments of errors or as specifications of errors and urges affirmance of the decree appealed from and this court determines that such contention is well founded in all respects and that no issue on the merits is, for such reasons, presentable to it, is it proper to affirm the degree appealed from?"

The question was answered, per curiam, in the affirmative *Squibb & Sons v M. Chemical Works* (1934) L ed Advance Opinions, vol 79, p 129

In aid of reference to the course of decisions as to appellate review in this Circuit Court of Appeals, we offer the following list of cases from the United States Court for China, believed to include all brought for review, indicating for each the nature of the decision.

Those starred involved questions of appeal and error or like questions of appellate review. Those double starred are of interest in the instant appeal, Chalaire v Franklin.

** 156 F 759 (1907) *Biddle v United States*
Reversed, with directions

* 165 F 893 (1908) *Curtis v Wilfley,* Judge
Petition for certiorari denied

* 167 F 125 (1909) *Toeg & Read v Suffert*
Dismissed

* 169 F 79 (1909) *Price v United States*
Dismissed

* 171 F 835 (1909) *Cunningham v Rodgers, Consul General*
Dismissed

* 193 F 973 (1912) *Cathay Trust v Brooks*
Reversed, with directions

* 213 F 737 (1914) *Connell Bros Co v Diedrichsen & Co.*
Affirmed
255 F 71 (1919) *Swayne & Hoyt v Everett*
Affirmed

** 274 F 774 (1921) *American Trading Co v Steele*
Affirmed
279 F 563 (1922) *Fleming v United States*
Affirmed

** 298 F 446 (1924) *Montgomery, Ward & Co v Banque Belge*
Affirmed

‡ 3 F 2d 369 (1925) *Green Star SS Co v Nanyang Bros Tobacco Co*
Affirmed

** 7 F 2d 581 (1925) *China Press v Webb*
Affirmed
10 F 2d 772 (1926) *Neuss, Hesslein & Co v Van der Stegen*
Remanded, with directions to dismiss

* 11 F 2d 715 (1926) *Wulfsohn v Russo-Asiatic Bank*
Affirmed

* 14 F 2d 586 (1926) *Andersen, Meyer & Co v Fur & Wool Trading Co*
Affirmed
18 F 2d 6 (1927) *Globe & Rutgers Fire Ins Co v King Foong Silk Filature*
Affirmed

* 23 F 2d 670 (1928) *Gillespie v Hongkong & Shanghai Banking Corp*
Affirmed

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‡*Green Star SS Co v Nanyang Bros Tobacco Co* involved objection to allowing amendment of answer to plead limitation of action by agreement.

26 F 2d 847 (1928) *Husar v United States*
Affirmed

28 F 2d 468 (1928) *National City Bank v Harbin Electric Co*
Reversed, and remanded for further proceedings

* 30 F 2d 278 (1929) *Republic of China v Merchants Fire Assur Corp*
Reversed, and remanded for further proceedings

* 30 F 2d 932 (1929) *Archer v Heath,* Warden
Reversed, with directions

* 33 F 2d 816 (1929) *McDonnell v Bank of China*
Reversed, and remanded; dissenting opinion

49 F 2d 8 (1931) *Republic of China v Merchants Fire Assur Corp,* Second Case
Affirmed

** 59 F 2d 8 (1932) *Yangtsze Rapid SS Co v Deutsch-Asiatische Bank*
Affirmed

* 66 F 2d 811 (1933) *Woo King-hsun v Pemberton & Penn, Inc*
Affirmed

** 71 F 2d 895 (1934) *Pickering & Co v Chinese American Cold Storage Assn*
Affirmed

Besides those cases above indicated as involving points in appeal and error or like questions of ap-

pellate review, there are important elements of others of the cases that bear upon right to and procedure for review.*

(The whole system of review from extraterritorial courts, especially from the British, could be profitably studied for purpose of understanding the principles and the practical difficulties. The partially extraterritorial, partially national jurisdiction of Japan with respect to Japanese subjects in China is also very enlightening as to the provisions for appeal and the problems of appeal generally, and particularly for original jurisdiction of certain larger issues to be exercised in Japan.)

We feel assured the foregoing listing demonstrates particularly, and after reference to the opinions, the bearing of Section 5 of the Act of June 30, 1906, creating a United States Court for China, in the provisions of the Act that the procedure for appeal from the District Courts shall govern the procedure from the Court for China. The Circuit Court of Appeals decisions have followed the statute. The statute is mandatory.

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*From the beginning, cases appealed from China have been dealt with frequently on points of procedure. In the first in date, one from Canton

Steamer Spark v Lee Choi Chum (1872) 1 Sawyer 713; Fed Cas No 13206

an attempt was made by able counsel, Milton Andros, to have the vessel itself be appellant. The record was but a mass of papers and did not include those requisite for appeal.

(As to a case from Hiogo (near Kobe), its record was fatally defective. *Tazaymon v Trombly* (1878) 5 Sawyer 79; Fed Cas No 13810)

From the Consular Court at Shanghai came

The Ping On v Blethen (1882) 11 F 607

involving jurisdiction to review. Whatever the record, judgment was reversed.

Of more recent opinions those of Circuit Judges Wilbur, Sawtelle and District Judge Neterer, thoroughgoing and illuminative, bring forward the obligation in exercise of appellate jurisdiction not to undertake the functions that should have been brought into operation at instance of counsel in the trial courts. In a case from the District Court for the Northern District of California, Southern Division, which considers fully a situation parallel to those developed on appeal from China, and which we should wish to read in its entirety,

First Natl Bank of San Rafael v Philippine Refining Corporation of New York (1931) 51 F 2d 218 (cited above p 7)

the opinion reads:

> "In the case at bar it is clear, we think, that if we pass upon the questions of sufficiency of evidence to justify the judgment, we will be in effect considering an exception which was not in fact made, upon a question which was not even presented for the consideration of the trial court at the time fixed by law therefor".

In the case from China:

Yangtsze Rapid SS Co v Deutsch-Asiatische Bank (1932) 59 F 2d 8, 10, 11, 12

there was a narrative "Findings of Fact". However, the Court of Appeals said:

> "At the outset we are confronted with the fact that there is no proper bill of exceptions. Rule 10 of this court provides in explicit language: '2. Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary

to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise.'

"This same rule applies to appeals from the United States Court for China. (Quoting from China Press, v Webb, cited above p 6)

"In the instant case, however, the court made special findings of fact and drew therefrom certain conclusions of law. Exceptions to the conclusions of law were duly preserved by appellant. The question before us is whether the findings of fact tend to support the judgment. This question may be determined without a bill of exceptions. (Quoting Fleischmann Constr Co v United States (1926) 270 US 349; 70 L ed 624; above cited, p 6.)

". . . While we agree that the assignments of error are drawn imperfectly and not in strict accordance with the rules of this court, we are disposed to regard them as sufficient to bring the issues of law before us. Accordingly, we will now proceed to consider the case on its merits.

"As we have said before, we are bound by the findings of fact, there being no proper bill of exceptions before us.

"Judgment affirmed."

Needless to observe, the foregoing case was in much better situation as to record on appeal and the elements of that record than the instant case.

Where a question of state law, that of Oregon,

> "was not made below, was not discussed by the lower court, and is not included in the assignment of errors filed in this Court. We have no occasion to consider it."

Pacific States Box etc Co v White (Nov 18, 1935) United States Supreme Court, Opinion by Mr Justice Brandeis, Law ed Advance Opinions vol 80, p 133, 139

In the last case from China before Chalaire v Franklin the record on appeal presented the old, often recurring and serious difficulties. The law firm of Pillsbury, Madison & Sutro, for appellant, made best possible effort to overcome these difficulties and the Court of Appeals considered their representations in detail and at length.

Pickering & Co v Chinese American Cold Storage Assn (Jul 15, 1934) 71 F 2d 895

The entire opinion will be read with greatest interest. We endeavor to aid fairly by making the following quotations:

> "The court below rendered judgment on the sole ground that the contract . . . was void and unenforceable from its inception.
>
> "The case was tried to the court, sitting without a jury. The bill of exceptions does not contain an exception to the ruling that the purported contract was void for uncertainty. The trial court wrote a "Decision and Judgment", which was entered as a judgment in the case. It specifically set forth the court's 'conclusion of law'

that the purported contract was void and unenforceable. The 'decision and judgment' set forth a statement of facts, interspersed informally with a discussion of the law. The court stated that its decision 'required specific findings of fact'; but no statement of facts by the court other than the informal and incidental references appearing in the decision and judgment, is to be found in the record.

"Incorporated in the "Decision and Judgment" of the court below is the following: 'My conclusion of law is that the contract 'Exhibit A' was void and unenforceable from its inception and that plaintiff is not entitled to recover damages for it having been breached by the defendant.' Immediately following this 'conclusion of law' is the closing paragraph of the 'Decision and Judgment': 'It is the order and judgment of the Court that above entitled action be dismissed and that defendant have and recover judgment against plaintiff for its costs herein.'

. . .

"The limitations upon the power of an appellate court to review causes in which proper findings of fact and conclusions of law were not made in the court below, and proper exceptions were not saved have been clearly and exhaustively discussed in recent decisions of the Supreme Court. As will be seen from excerpts that follow, those limitations are not discretionary upon the reviewing court; they are mandatory.

Quoting at much length from the case of Fleischmann Constr Co v United States (cited above p 6); also from

Harvey Co v Malley (1933) 288 US 415; 77 L ed 866,

and observing as to the first:

"The Circuit Court of Appeals (298 F 330) disposed of this case in a per curiam opinion stating that, while there was a serious question whether there was anything before it because of the want of due exceptions, it 'preferred' to rest the affirmance of the judgment on the merits, as it thought that the District Court was clearly right on all the points decided." and saying: "These rules necessarily exclude from our consideration all the questions presented by the assignment of errors except those arising on the pleadings. All others relate either to matters of fact or to conclusions of law embodied in the general finding. These are not open to review, as there were no special findings of fact and no exceptions to the rulings on matters of law were taken during the progress of the trial or duly preserved by a bill of exceptions. The defendants offered no exceptions to the rulings of the court until after the writ of error had issued, transferring jurisdiction of the case to the court of appeals. And the recitals in the subsequent 'bills of exceptions' that the exceptions, then for the first time presented, were to be taken as made before the entry of the judgment, are nugatory. A bill of exceptions is not valid as to any matter which was not excepted to at the trial. (Citations) And it cannot incorporate into the record nunc pro tunc as of the time when an exception should have been taken, one which in fact was not then taken. (Citations)

"The statute, however, relates only to those rulings of law which are made in the course of trial, and by its terms has no application to the preliminary rulings of the district judge made, in the exercise of his general authority, before the issues are submitted to him for hearing under the statutory stipulation. Such rulings on the pleadings and the sufficiency of the complaint are therefore subject to review as in any other case, independently of statute. (Citations)

"Since, therefore, the questions arising on the pleadings in this case are now open to review, the motion to dismiss the writ of error must be denied."

The Supreme Court then proceeded to consider the rulings on the demurrers, and held the demurrers were rightly overruled. Thereupon, judgment of the Circuit Court of Appeals was affirmed.

Dated: December 20, 1935

Respectfully submitted,
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